

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALEJANDRO SANCHEZ-YEBENES,

Defendants.

Crim. No. 17-266 (DRD)

'What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure.'

Justice Frankfurter

OPINION AND ORDER

Pending before the Court is Defendant's *Motion for Suppression of Identification Evidence and to Preclude Tainted In-Court Identification Testimony* (Docket No. 60). Through said motion, Defendant argues the identification procedures used in the instant case by the local Police of Puerto Rico ("PRPD") were inherently suggestive, thus warranting the suppression of the lineup identification. (*Id.*) The United States duly opposed said motion. (Docket No. 66) The Court held a suppression hearing, which lasted from August 13, 2018 until August 16, 2018. (Docket No. 86-89) Subsequently, the Court ordered the parties to file additional briefs specifically based on the arguments raised during the hearing. (Docket No. 89) On November 5, 2018, both parties submitted their Supplemental Briefs. (Docket Nos. 94 & 95)

The issue before the Court is whether the lineup identification was impermissibly suggestive mainly due to the following reasons: (i) dissimilar characteristics of the fillers to the suspect in the lineup, (ii) the potential

exposure of the suspect to the primary witness prior to the lineup, and (iii) the potential information provided to the witness prior to the lineup that someone had been arrested in possession of his vehicle.

BACKGROUND

A. The carjacking incident

On February 26, 2017, Hector Diaz-Torres ("Diaz-Torres") was driving his Toyota Corolla while he took a friend to a home in Bayamón. (Docket No. 87 at 68-69) At approximately 9:45 PM, as Mr. Diaz-Torres exited and walked around the back of the vehicle to open the door for his friend, a white Toyota Yaris with dark tinted window pulled up behind him. (Docket No. 87 at 69) Two individuals with black pistols got out of the car. (Id.) As Diaz-Torres's was facing the trunk of his vehicle, one of the individuals pointed a gun to his head and the other pointed a gun at his back. (Id.)

Following this, both armed men approached Diaz-Torres and asked him for the vehicle, his watch and cash. (Id.) The assailant, who is the defendant in this case, asked Diaz-Torres for his watch, which he took off but dropped it on the floor as he was nervous. (Docket No. 87 at 73, 75) When Diaz-Torres bent down to pick the watch up, allegedly he looked up and was able to see the face of the assailant that was pointing a gun to his head. (Id.) Diaz-Torres indicated the assailant was standing about a foot and a half to his right side, and that he was able to look at him for two seconds. (Id. at 76-77) During the suppression hearing, Diaz-Torres was able to act out exactly how the incident occurred. See Docket No. 87 74-75.

During cross examination, Diaz-Torres admitted that the defendant's weapon was in his right hand pointing towards his head. (Docket No. 87 at 104) He also clarified that when he dropped the watch, he bent over to pick it up with his left hand, and then turned towards the assailant standing on his right side. (Id.) Essentially, Diaz-Torres admitted that when he picked up the watch and looked towards the assailant, his head passed directly in front of the pistol. (Id. at 106) At that moment, the assailant told Diaz-Torres "Motherfucker, don't let it fall to the ground." (Id. at 107) The assailants then pushed Diaz-Torres against the vehicle and left the scene. (Id.)

B. Post-carjacking interview

After the assailants drove away with Diaz-Torres' car and possessions, he made a 911 call. (Docket No. 87 at 109). During the first opportunity Diaz-Torres had to provide a description of the assailants, he identified them as "ha[ving] caps and dark jeans". (Id.) Diaz-Torres described his emotional state to the 911 operator as "very nervous, man, really..." (Docket No. 85; Defense Exhibit D2 at 2)

Shortly after the 911 call, three municipal officers from the Bayamon Municipal Police Department appeared at the scene. (Docket No. 87 at 109) The Municipal Police interviewed Diaz-Torres almost immediately after the carjacking occurred. (Id. at 110) According to Diaz-Torres, he provided the municipal officer with a full description of the suspects. (Id. at 111) He described them as having caps and dark jeans. (Id. at 112) Additionally, he testified that he wanted to give the police the best chance possible to catch the perpetrators to return his vehicle. (Id.)

The Municipal Officer who interviewed Diaz-Torres, Officer Felix Rosario, testified during the suppression hearing that when he arrived at the scene, Diaz-Torres "was really nervous" and "really shaken up", such that he became concerned because he believed Diaz-Torres could have had some sort of medical condition not known by the victim. (Docket No. 87 at 135). After calming Diaz-Torres down and offering him medical assistance, which he refused, Officer Rosario began to interview him. (Id. at 135, 138, 141) Officer Rosario and Diaz-Torres spoke for about thirty minutes. (Id. at 135) Officer Rosario tried to place Diaz-Torres in a state of mind where he could receive some information from him by telling him to take a deep breath and further requesting him to "try to remember every detail that he could as to the events so nothing would be left out." (Id. at 141) Diaz-Torres was unable to provide a description about the skin, weight, height, or physical appearance of the assailants. (Id. at 136) In that moment, Diaz-Torres was only able to describe the assailants as wearing two black caps that they had put on all the way down. (Id.)

C. Interview with CIC Officer

Two days after the carjacking, PRPD CIC Officer Kenny Vega interviewed Diaz-Torres over the phone. (Docket No. 87 at 82). Officer Kenny Vega has been working nineteen years with the Police of Puerto Rico. (Docket No. 87 at 20) His role as a CIC investigator involved investigating car jackings and robberies with the use of a firearm. (Id. at 21) During the interview, Diaz-Torres for the first time provided a description of the assailant he was able to look at during the incident. (Id. at 82) Diaz-Torres described the assailant as “thin, tall, with a well-formed nose, and the Adam's apple.” (Id.) As to the second assailant, Diaz-Torres was only able to identify the person as short, skinny and had a cap. (Id. at 84)

During the testimony of Officer Kenny Vega, he stated that Diaz-Torres described the assailant he was able to look at as “very thin person of an approximate height of five-nine, with a cap” and “he was a light, dark-skinned person.” (Id. at 24) According to Officer Kenny Vega, Diaz-Torres also described the second assailant as “skinny person, about five-ten height... with dark clothes.” (Id. at 25)

D. The Exchange at the Vega Baja Stolen Vehicles Station

A month and two weeks after the carjacking occurred, PRPD Officer Jose Rodriguez Santos was patrolling around the area of Dorado when he noticed a forged license plate on a Toyota Corolla. (Docket No. 86 at 20-21) Officer Rodriguez verified the VIN number of the car and realized the license plate did not match. (Id. 21-22) Officer Rodriguez then proceeded to place the driver, Mr. Alejandro Sanchez-Yebenes (the “Defendant”), under arrest and took him to the Stolen Vehicles Division in Vega Alta. (Id. at 23) Subsequently, Officer Rodriguez called Diaz-Torres and requested him to come to the Stolen Vehicle Division. (Id. at 24) Officer Rodriguez specifically told Diaz-Torres over the phone that he arrested an individual related to his stolen Toyota Corolla. (Docket No. 86 at 64) He also asked him over the phone if he would be able to identify any of the persons involved in the carjacking. (Id. at 24) Diaz-Torres responded that he was only able to see one of the assailants and that he remembered “he had a pointy nose, that he had an

extended throat, and that he was very skinny, because he could see his arm that was very skinny.”¹ (Id.) Officer Rodriguez also called the Defendant’s girlfriend, Alexandra Rivera Ortiz (“Rivera-Ortiz”). (Docket No. 86 at 33)

The Defendant was placed in a room with metal doors inside the station. (Docket No. 86 at 28; See Docket No. 84, Exhibit 1A, marked with a “1” for the location of the room where the Defendant was held) The Defendant’s girlfriend Rivera-Ortiz arrived at the station before the victim Diaz-Torres. (Docket No. 86 at 33) When she arrived, she went to the desk officer area where Officer Rodriguez meet her. (Id.) Officer Rodriguez told her to wait in a bench outside the building. (Docket No. 86 at 34; Docket No. 84; Exhibit 1A, marked with a “4” for the location of the bench where Rivera-Ortiz waited). Officer Rodriguez told Rivera-Ortiz that the Defendant wanted some cigarettes, so she went to buy some and then returned to the station. (Docket No. 89 at 17) When she returned to the station, she talked to Officer Rodriguez by the bench where she initially waited and asked if she could see the Defendant. (Docket No. 89 at 18) Officer Rodriguez took Rivera-Ortiz to the office where the Defendant was located. (Docket No. 89 at 18-19; Docket No. 84; Exhibit 1A, marked with a blue line for the location where Officer Rodriguez took Rivera-Ortiz to see the Defendant). Officer Rodriguez then brought the Defendant out, and the Defendant and Rivera-Ortiz sat in a bench outside for about six minutes. (Docket No. 89 at 19-20, 22; Docket No. 85; Exhibit G, marked with a “AB” for location where Defendant and girlfriend were sitting down having a cigarette) The Defendant was handcuffed both in his hands and feet at the time. (Docket No. 89 at 19)

Diaz-Torres eventually arrived at the station and went directly to the desk officer’s area and identified himself. (Docket No. 87 at 85) Officer Rodriguez took Diaz-Torres to the parking lot, where his vehicle was parked, enabling him to identify whether the recovered vehicle was his. (Docket No. 87 at 85; Docket No. 84; Exhibit 1A, marked with a “P” for the location of the Toyota Corolla) Diaz-Torres effectively identified the

¹ By “extended throat” the victim meant the assailant had a pronounced Adam’s apple.

vehicle. Diaz-Torres then went back to the desk officer's area and waited for about an hour until three officers from the CIC came to interview him. (Docket No. 87 at 86)

During the suppression hearing, Defendant's girlfriend Rivera-Ortiz testified that while the Defendant was having a cigarette outside on the bench, Officer Rodriguez came out of the office with a man for about a minute. (Docket No. 89 at 22, 23) The man and Rivera-Ortiz, who was sitting exactly next to the Defendant, exchanged glances, and then Officer Rodriguez and the man went inside the station. (Docket No. 89 at 23) Subsequently, Officer Rodriguez told Rivera-Ortiz that the Defendant was going to be transferred to CIC in Bayamon for a lineup. (Docket No. 89 at 24) Officer Rodriguez, CIC agents, and Rivera-Ortiz walked with the Defendant handcuffed down the station hall, pass the desk officer, and exited the station to place the Defendant inside a vehicle. (Id. at 24-25) During the time the Defendant walked handcuffed through the station, Diaz-Torres was inside the desk office, which had a door with a glass window. (Id. at 25) Rivera-Ortiz saw him standing near the door when they walked past. (Id.)

Conversely, Officer Rodriguez testified that when Diaz-Torres arrived at the station, he went to the office where the Defendant was held and told his fellow officers that he was going to be with the victim outside and to keep the door closed. (Docket No. 86 at 37) He then took Diaz-Torres to identify the vehicle. (Id. at 38) Thus, Officer Rodriguez's testimony was that the Defendant was in an office while Diaz-Torres was outside identifying the vehicle. (Docket No. 86 at 40) When the Court asked Officer Rodriguez where Defendant's girlfriend, Rivera-Ortiz, was at the time Diaz-Torres went to identify the car, Officer Rodriguez responded with "at a certain points she went out, so I don't remember if that moment she was there or she had gone out." (Docket No. 86 at 38)

E. The Lineup

On the same day the car was recovered, April 14, 2017, Diaz-Torres went to the CIC station in Bayamon for another interview with Officer Vega, who was the PRPD lead investigator of the case. (Docket No. 87 at 30) During the interview, Officer Vega asked Diaz-Torres to once again tell him what happened, and whether

Diaz-Torres had any other description of the assailants considering some time had passed and he was more relaxed than the first time he was interviewed. (Id.) Diaz-Torres gave the same description he previously provided “thin, five-nine, and light dark skin.” (Id.) Officer Vega then specifically told him “that there was a person that had been arrested, arrested inside the vehicle that had been stolen from him”, and he explained that a lineup was going to be performed with that individual. (Id.) During the suppression hearing, defense counsel established the existence of a PRPD general order governing lineup procedures, which provides that an officer should not tell a witness that there is a detained suspect, or that someone has been arrested prior to the administration of a lineup. (Docket No. 87 at 61-62) Officer Vega, a veteran of nineteen-year member of the PRPD, admitted he violated the rules and procedures that govern the PRPD’s administration of a lineup by informing Diaz-Torres that the police had arrested someone in possession of his vehicle. (Docket No. 87 at 62) After the interview, Officer Vega told Diaz-Torres to come back the next day for the lineup.

The next day, Saturday, April 15, 2017, Officer Vega tried to locate participants matching the description provided by Diaz-Torres, but Officer Vega was having difficulties. (Docket No. 87 at 32) After Officer Vega took considerable efforts to find people matching the defendant’s description, including visiting at least seven different locations, the lineup was conducted in the afternoon of April 15, 2017. (Id. at 33) Officer Vega, the lead investigator in the case, conducted the lineup himself. (Id. at 126) The lineup was composed of the following five individuals:



To questions posed by defense counsel during cross examination, Diaz-Torres admitted he could automatically disregard persons number 1, 2, 4, and 5 from the lineup. (Docket No. 87 at 127-28) As such, Diaz-Torres quickly identified as the assailant number 3. (Docket No. 87 at 63)

LEGAL ANALYSIS

A. Applicable Law

Pretrial identification evidence is subject to constitutional limitations under the Due Process Clause. Stovall v. Denno, 388 U.S. 293, 298-99 (1967); United States v. Watson, 76 F.3d 4, 6 (1st Cir. 1996)(*citing* Manson v. Brathwaite, 432 U.S. 98, 97 (1977)). Courts apply a two-pronged analysis to determine whether evidence of a pretrial identification should be suppressed. Watson, 76 F.3d at 6. “First, the court must determine whether the procedure was impermissibly suggestive.” Id. If so, then the court “must decide whether the identification itself was reliable under the totality of the circumstances, notwithstanding the suggestive procedure.” Id. If the court finds the identification to be reliable, it is admissible. United States v. Henderson, 320 F.3d 92, 101 (1st Cir. 2003); *see also* United States v. Alexander, 868 F.2d 492, 495 (1st Cir.1989) (explaining that even if the procedure at issue “could be termed unnecessarily suggestive, a court need not suppress the identification unless it lacked a sufficient basis for reliability”).

The First Circuit has stated before that “[a]s the sequence of this analysis makes clear, reliability is the key.” U.S. v. De Leon-Quñones, 588 F.3d 748, 753 (1st Cir. 2009); *see also* Manson, 432 U.S. at 114 (observing that “reliability is the linchpin in determining the admissibility of identification testify.”) To assess whether a pretrial identification was reliable, the court must consider the “totality of the circumstances.” Neil v. Biggers, 409 U.S. 188, 199 (1972). The five factors to be considered in assessing reliability are “(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the defendant; (4) the level of certainty demonstrated by

the witness at the confrontation; [and] (5) the length of time between the crime and the confrontation.”
Henderson, 320 F.3d at 100.

B. Application of the Law to the Instant Case

In the instant case, Defendant argues the identification procedure undertaken by the PRPD was inherently suggestive as the lineup involved the police telling the witness someone in the lineup was arrested in possession of his vehicle, the potential exposure of the suspect to the witness prior to the lineup, and presenting a lineup containing fillers who matched neither the suspect nor the description provided by the witness. (Docket No. 95 at 1) On the other hand, the Government argues the testimonies presented during the suppression hearing demonstrated that Diaz-Torres never saw the Defendant handcuffed outside the police station prior to the administration of the lineup. (Docket No. 94 at 7) The Defendant avers that once a lineup is determined to be inherently suggestive, “it falls on the government to prove the identification [was] reliable and uncorrupted.” (Docket No. 95 at 1) According to the Defendant, the Government failed to demonstrate the corrupted lineup identification was independently reliable. (*Id.* at 20) In addressing the reliability prong, the Government simply argued in one paragraph how the Diaz-Torres’ conduct complied with the reliability factors, but did not provide any record citations to support the arguments. (Docket No. 94 at 10)

a. Lineup was Suggestive

In the case of *United States v. Wade*, the Supreme Court set out instances characterized as **suggestive** identification procedures, for example, “that all in the lineup but the suspect were known to the identifying witness, **that the other participants in a lineup were grossly dissimilar in appearance to the suspect**, that only the suspect was required to wear distinctive clothing which the culprit allegedly wore, that the witness is told by the police that they have caught the culprit after which the defendant is brought before

the witness alone or is viewed in jail, that the suspect is pointed out before or during a lineup, and that the participants in the lineup are asked to try on an article of clothing which fits only the suspect.” United States v. Wade, 388 U.S. 216, 233 (1967)(emphasis ours).

Insofar the appearance of the participants in a lineup differs from that of the suspect, “[a] lineup is unduly suggestive...if [the defendant] meets the description of the perpetrator previously given by the witness and the other lineup participants obviously do not.” Raheem v. Kelly, 257 F.3d 122, 134 (2d Cir. 2001). “Lineups in which suspects are the only participants **wearing distinctive clothing or otherwise matching important elements of the description provided by the victim** have been severely criticized as substantially increasing the dangers of misidentification.” Id. (emphasis ours)(*quoting* Israel v. Odom, 521 F.2d 1370, 1374 (7th Cir.1975)).

An identification procedure was found unduly suggestive when the defendant “was the only panel participant who possessed [the] salient characteristic” identified by the victim, which was the defendant’s foreign accent. United States v. Garcia-Alvarez, 541 F.3d 8, 14 (1st Cir. 2008)². Moreover, the First Circuit determined a photograph identification procedure was unduly suggestive when the defendant’s photograph was the only photograph that matched the age and description of the suspect and the defendant was depicted in a striking shirt while the others wore more muted clothes. United States v. Castro-Caicedo, 775 F.3d 93, 98-99 (1st Cir. 2014). Similarly, a lineup was determined unnecessarily suggestive when defendants were “the only two in the lineup wearing black leather coats, which coats had been an integral part of [witness’s] description of his assailants.” United States ex rel. Pierce v. Cannon, 508 F.2d 197, 200-201 (7th Cir. 1974). Just as, lineup was held suggestive when defendant was the only person in the lineup with dreadlocks, when

² In the instant case, there were only two potential thin persons in the lineup, but one of those was of darker skin than the other remaining potential person left to choose out of.

dreadlocks were the most distinctive feature of the description given by the victim who identified him from the lineup. Frazier v. New York, 156 Fed. Appx. 423, 425 (2d Cir. 2005).

In the case at bar, the victim Diaz-Torres gave at least four descriptions of the Defendant at different times. First, immediately after the carjacking occurred, the local Municipal Police appeared at the scene and asked Diaz-Torres to describe the assailants. (Docket No. 87 at 141) Diaz-Torres first described the assailants as “ha[ving] caps and dark jeans”. (Docket No. 87 at 109) Then, two days after the carjacking occurred, Officer Vega interviewed Diaz-Torres over the phone. (Docket No. 87 at 82) Diaz-Torres then described the assailant as “**thin**, tall, with a well-formed nose, and the **Adam's apple**.” (Docket No. 87 at 82)(emphasis ours) During the testimony of Officer Vega at the suppression hearing, he stated Diaz-Torres described the assailant as “very **thin** person of an approximate height of five-nine, with a cap” and “he was a **light, dark-skinned person**.” (Docket No. 87 at 24)(emphasis ours) Subsequently, a month and twenty days after the carjacking occurred, Officer Rodriguez called Diaz-Torres and requested his presence at the Vega Baja stolen vehicle station. (Docket No. 86 at 24) When asked by Officer Rodriguez to describe the assailant, Diaz-Torres described the assailant as “he had a pointy nose, that he had an **extended throat**, and that he was very **skinny**, because he could see his arm that was very skinny.” (Docket No. 86 at 24)(emphasis ours) The record later reflects that by “extended throat” the victim was referring to the assailants pronounced Adam’s apple. (Id.) Lastly, on the same day Diaz-Torres went to the station to identify his vehicle, he later proceeded to the PRPD CIC station in Bayamon, where he was interviewed once again by Officer Vega, and then described the Defendant as “**thin**, five-nine, and **light dark skin**.” (Docket no. 87 at 30)(emphasis ours)

As it is clear from the record, Diaz-Torres provided at least three consistent salient characteristics for the Defendant throughout the different descriptions he gave to law enforcement officials at different times. Diaz-Torres more than once described the Defendant as “thin”, “light dark skin” and had a pronounced

“Adam’s apple”. An examination of the lineup held in this case reveals that only two of the five participants could be characterized as thin, and the remaining participant other than the Defendant had dark skin. Thus, the Defendant is only one in the lineup who is skinny AND has “light dark skin”. Cf. United States v. Williams, 469 F.2d 540, 542-43 (D.C. Cir. 1972)(holding lineup unduly suggestive when a witness stressed the youth and short stature of the perpetrator and a lineup was conducted in which the defendant was one of only two participants who could reasonably be characterized as short, and in which the other short participant was demonstrably much older). Moreover, the Defendant’s “Adam’s apple” appears demonstrably visible despite the fact that he is wearing a turtleneck sweater. That is, the piece of the turtleneck sweater covering the Defendant’s neck is rolled down to extent that his neck, and hence “Adam’s apple”, is demonstrably visible. The PRPD failed to take remedial efforts to fix this disparity. Most importantly, the Defendant is the only panel participant who has a visible “Adam’s apple”, which is the salient characteristic Diaz-Torres used to describe the assailant.



Furthermore, Diaz-Torres' testimony at the suppression hearing demonstrates that the differences in weight among the participants in the lineup had the predictable effect of focusing his attention on the Defendant. Diaz-Torres testified he could "immediately discard" number 1, number 2, and number 5, because they were obviously not skinny. (Docket No. 87 at 127) Additionally, Diaz-Torres stated he could immediately discard number 4 because he did not have the skin color he described to Officer Vega. (*Id.* at 128) He was easily able to identify the assailant as "number 3". (*Id.* at 63) Indeed, even to an unrelated question posed by the Government as to "[h]ow do the five people that are shown in this image compare to the five people that you saw the day of the lineup?", the Defendant simply responded "because of how skinny he is", thus confirming the reason why Diaz-Torres identified number 3 as the assailant was because of how skinny he was. The Court understands the lack of uniformity in weight and skin color distribution of the panel is overwhelming. (Docket No. 87 at 89). Just as the First Circuit determined in *Castro-Caicedo* the identification procedure was unduly suggestive when the defendant was the only one depicted that matched the age and description provided by the suspect and he was depicted with a striking shirt, the Court understands in the instant case the identification procedure was unduly suggestive as the Defendant is the only one matching the weight and skin color description provided by Diaz Torres and he is the only wearing the turtleneck sweater rolled down below the "Adams apple". See *Castro-Caicedo*, 775 F.3d at 98-99. Therefore, the Court finds the fact the Defendant was the only panel member who meet the description Diaz-Torres gave to law enforcement officials- i.e. skinny, light dark skin and Adam's apple- made the lineup procedure in this case inherently suggestive.³

³ Considering there is enough evidence to conclude the identification procedure was inherently suggestive, the Court will not address the merits of the other arguments posed by the Defendant regarding suggestibility. Especially in light of the fact that there was conflicting testimony offered as to whether Diaz-Torres did effectively see the Defendant at the police station.

b. Lineup was Unreliable

“A suggestive identification may nonetheless remain in evidence if, given the totality of the evidence, it is reliable.” Garcia-Alvarez, 541 F.3d at 14 (*citing* United States v. De Jesus-Rios, 990 F.2d 672, 677 (1st Cir. 1993)). As such, the Court will proceed to evaluate the five factors to be considered in assessing reliability.

1. The opportunity of the witness to view the criminal at the time of the crime

In the instant case, the carjacking occurred on February 26, 2017 at 9:45 PM in Bayamon Puerto Rico. (Docket No. 87 at 68-69). Even though Diaz-Torres testified during the suppression hearing that “it wasn’t very dark” at that time, the Court took judicial notice that the Astronomical Applications Department of the U.S. Naval Observatory in Washington D.C. documented the sunset at 6:30 PM in Bayamon, Puerto Rico, on February 26, 2017.⁴ (Docket No. 88 at 25) Thus, it was completely dark outside at the time the carjacking occurred. Additionally, Diaz-Torres indicated the assailant was standing about a foot and a half to his right side, and that he was able to look at him for two seconds. (Docket No. 87 at 76-77)

Equally important, Diaz-Torres acted out the events that unfolded during the carjacking at the suppression hearing. (Docket No. 87 at 74) At first, Diaz-Torres never indicated the assailant moved towards his right side when he bent down to pick up his watch. (Docket No. 87 at 74)(Court stating “[f]irst of all, you said he was at your back”, to which Diaz-Torres responded “Yes”.) The Court inquired how Diaz-Torres could see the assailant’s face if he was behind him with a gun to his head, and Diaz-Torres then proceeded to change his description of how the events unfolded by indicating the assailant had moved to his right side. (Docket No. 87 at 75-76). Important to realize also is that this was the only opportunity Diaz-Torres had to view the assailant. In like manner, Diaz-Torres admitted that the carjacking occurred “very, very quickly”, and

⁴ Pursuant to Fed. R. of Evid. 201, the Court can take judicial notice of facts published by a United States official agency. See Gent v. Cuna Mut. Ins. Soc’y, 611 F.3d 79, 84 n. 5 (1st Cir. 2010)(taking judicial notice of information about Lyme disease taken from website of Center for Disease Control and Prevention, a federal agency).

that he was not paying much attention to the car in which the assailants arrived because he thought it was simply a passing car. (Docket No. 87 at 108; 96-97)

Diaz-Torres notably admitted he had a gun directly pointed to his back and another gun pointed to his head at the same time. (Docket No. 87 at 97) The expert testimony offered at the suppression hearing suggested that the threat of gunfire makes people less likely to recollect accurately the person holding the firearm. (Docket No. 88 at 68-69) Furthermore, Diaz-Torres admitted that when he dropped his watch, he bent down to pick it up with his left hand and turned to the right as he was moving upward. (Docket No. 87 at 75-76) At that moment, Diaz-Torres was able to look at the assailant for two seconds. (Docket No. 87 at 75-76) Markedly, however, Diaz-Torres admitted during cross examination that when he looked upwards his “head passe[d] directly in front of the pistol.” (Docket No. 87 at 108)

Moreover, Diaz-Torres identified both assailants as “ha[ving] caps and dark jeans”. (Docket No. 87 at 109) Expert testimony was also offered regarding the effect of utilizing a hat during a crime. (Docket No. 88 at 48) Specifically, the expert testified that people use certain qualities of “people’s facial features” to identify them, and that the “hairline is particularly important” when one tries to identify a person whom you have never seen before. (Id.) Consequently, hats are particularly effective disguises because they cover the hairline. (Id.)

The Fourth Circuit found a witnesses’ opportunity to view a perpetrator is limited when the perpetrator was at the scene of the crime for a short period of time and he was wearing a long wig (i.e. covering his hairline) and sunglasses. United States v. Greene, 704 F.3d 298, 308 (4th Cir. 2013); see also United States v. Rogers, 126 F.3d 655 (5th Cir. 1997)(finding witness’s opportunity to view perpetrator was limited when he was wearing a baseball cap and sunglasses). Similarly to the case at bar, the Second Circuit concluded a witness’s opportunity to observe a perpetrator was minimal at best when his opportunity to form an accurate mental picture was impaired by the fact that it was nighttime, the tension of the moment, the distance between

himself and the car, and the hat the perpetrator was wearing, which was pulled over his head. Dickerson v. Fogg, 692 F.2d 238, 245 (2d Cir. 1982).

In the instant case the Court finds Diaz-Torres' opportunity to view the Defendant was minimal because he admitted the events occurred quickly, it was dark at night, the assailant was wearing a cap covering his face, and he was only able to look at the assailant for two seconds while his head passed directly in front of the muzzle of a gun. Moreover, the Court deems unreliable the witness' testimony as to the events that occurred considering there have been inconsistencies in his testimony as to how the events of the carjacking unfolded. Docket No. 87 at 74-76; *See also* Docket No 86 at 24 and Docket No. 87 at 84 (providing physical description of second assailant to Officer Vega two days after carjacking, and then informing Officer Rodriguez seven weeks after the carjacking that he was not able to see the second assailant). For these reasons, the Court determines the witness's opportunity to view the Defendant is unreliable.

2. The witness' degree of attention

Evidence was introduced at the suppression hearing as to how nervous Diaz-Torres was during the carjacking incident and shortly thereafter. For example, the transcript for the 911 call placed by Diaz-Torres shows he accepted to the police he felt "very nervous, man, really" (Docket No. 85, Exhibit 1 at 15) Diaz-Torres also admitted he dropped the watch because he "was nervous." (Docket No. 87 at 80) Moreover, the municipal police officer that arrived at the scene shortly after the carjacking occurred, Officer Rosario, testified at the hearing that Diaz-Torres was very nervous when he arrived, to the point that he "became concerned because maybe [Diaz-Torres] had some sort of medical condition that [he] did not know about." (Docket No. 87 at 135).

Another key point, Diaz-Torres was facing the back of his car the entire time the carjacking occurred, except when he was able to look at the assailant for two seconds when he was lifting the fallen watch from the floor with his left hand, and turned to the right, where the assailant was allegedly standing, while he was

moving upward. (Docket No. 87 at 75-76) The Court, however, has doubts as to the degree of attention he was able to dedicate to the assailant's physical traits during the two seconds he looked at the Defendant in the dark. Especially because Diaz-Torres's head passed directly in front of the pistol at that time such that he would have been looking at the muzzle of the gun instead of the assailant's face. Further, the original testimony was that the assailants were both behind Diaz-Torres. Therefore, considering the degree of nervousness the witness exhibited coupled with the fact that he had a gun pointed to his head during the two seconds he was able to look at the assailant, the Court considers the witness' degree of attention was compromised. *E.g.*, Dickerson, 692 F.2d at 245 (finding witness could not have paid a great deal of attention to the perpetrator when he was frightened and agitated).

3. The accuracy of the witness' prior description of the defendant

Diaz-Torres gave at least four different descriptions of the assailant at different times. First, immediately after the carjacking occurred, the Municipal Police appeared at the scene and asked Diaz-Torres to describe the assailants. (Docket No. 87 at 141) Diaz-Torres first described the assailants as "ha[ving] caps and dark jeans". (Docket No. 87 at 109) Then, two days after the carjacking occurred, Officer Vega interviewed Diaz-Torres over the phone. (Docket No. 87 at 82) Diaz-Torres then described the assailant as "thin, tall, with a well-formed nose, and the Adam's apple." (Docket No. 87 at 82)(emphasis ours) During the testimony of Officer Vega at the suppression hearing, he stated Diaz-Torres described the assailant as "very thin person of an approximate height of five-nine, with a cap" and "he was a light, dark-skinned person." (Docket No. 87 at 24)(emphasis ours) Subsequently, a month and twenty days after the carjacking occurred, when asked by Officer Rodriguez to describe the assailant, Diaz-Torres described the assailant as "he had a pointy nose, that he had an extended throat, and that he was very skinny, because he could see his arm that was very skinny." (Docket No. 86 at 24)(emphasis ours) Lastly, on the same day Diaz-Torres went to the station to identify his vehicle, he later went to the PRPD CIC station in Bayamon, where he was interviewed once again

by Officer Vega, and then described the Defendant as “thin, five-nine, and light dark skin.” (Docket no. 87 at 30)

Although Diaz-Torres gave descriptions with consistent salient characteristics, none of the reported descriptions contain the same level of detail or wording. Moreover, right after the carjacking occurred, Diaz-Torres was unable to provide a detailed description of the assailants when he testified he “wanted to help the police as much as possible” to “give them the best chance possible to catch the perpetrators.” (Docket No. 87 at 112) He simply described the assailants to the municipal officer as “ha[ving] caps and dark jeans”. (Docket No. 87 at 109) The sole purpose of the meeting between Diaz-Torres and the municipal police at the scene of the crime was to conduct an investigation. At that moment, no suspect had been caught. Diaz-Torres was not injured, in danger, in any hurry, or otherwise precluded from providing as much descriptive detail as possible to the investigating police. Moreover, immediately after the carjacking would have been the ideal moment to provide a description of the defendant considering that was when his memory of the assailants was the clearest. Therefore, the Court finds the accuracy of the witness’ prior description of the Defendant is unreliable.

4. The level of certainty demonstrated by the witness at the confrontation

At the suppression hearing, Diaz-Torres testified he could “immediately discard” number 1, number 2, and number 5, because they were not skinny. (Docket No. 87 at 127) Additionally, Diaz-Torres stated he could immediately discard number 4 because he did not have the light skin color he described to Officer Vega. (Id. at 128) He was easily able to identify the assailant as “number 3”. (Id. at 63) As such, Diaz-Torres’s demonstrated a great deal of confidence in his ability to identify the Defendant as the assailant. The Court, however, is mindful of the fact that the witness demonstrated certainty in an identifying the Defendant in a lineup procedure that has been deemed unduly suggestive. Nonetheless, the First Circuit has expressed “[The witness] certainty is at best a neutral factor, and here there is no indication of [his] lack of certainty.”

Castro-Caicedo, 775 F.3d at 100 (*citing* United States v. Jones, 689 F.3d 12, 18 (1st Cir. 2012)) (“[T]he witness’ lack of confidence is certainly a reliable warning sign, while the presence of confidence is probably closer to a neutral factor.”). Notwithstanding Diaz-Torres demonstrated a high level of confidence in identifying the Defendant as the assailant, the Court finds this is a neutral factor in the Court’s reliability assessment.

5. The length of time between the crime and the confrontation

The carjacking occurred on February 26, 2017, while the lineup was held on April 15, 2017. Thus, a month and twenty days passed between the day of the carjacking and the day lineup procedure was held. Circuit Courts have found the passing of longer periods of time as reliable. See e.g., Levasseur v. Pepe, 70 F.3d 187, 195 (1st Cir. 1995) (identification 6 months after crime reliable); United States v. Plunk, 153 F.3d 1011, 1022 (9th Cir.) (identification reliable because time elapsed since crime, although not insignificant, was less than 7-month period approved by Supreme Court in *Biggers*). Nonetheless, Circuit Courts have recognized studies showing that “even a one-week delay can cause the “typical eyewitness viewing a perpetrator’s face that [is] not highly distinctive ... to have no more than a 50% chance of being correct in his or her lineup identification.” Young v. Conway, 698 F.3d 69, 84 (2d Cir. 2012) (*citing* Kenneth A. Deffenbacher et al., *Forgetting the Once–Seen Face: Estimating the Strength of an Eyewitness’s Memory Representation*, 14 J. Experimental Psychol.: Applied 139, 147–48 (2008)); Dennis v. Sec’y, Pennsylvania Dep’t of Corr., 834 F.3d 263, 328 (3d Cir. 2016) (*citing* same article).

During the suppression hearing, expert testimony was offered as to how the passage of time degrades memory and causes memory to be more susceptible to external influence and corruption. (Docket No. 88 at 46) The scientific terminologies utilized were “decay” and “interference”. (Docket No. 88 at 46) The expert explained how “decay” refers to the idea that the quality of a memory becomes less available over time, while “interference” refers to the idea that when a person remembers an event, there may be other experiences that influence a memory of a specific event. (*Id.* at 46-47) Essentially, the expert explained how memory

changes over time and becomes distorted with other knowledge that a person may acquire from external sources or from thinking about the event. (Id. at 48).

The time interval in the instant case was not lengthy enough to have completely obscured Diaz-Torres' memory of the carjacking. Nonetheless, several hours after the carjacking occurred, which is the time when a witness can retain the sharpest image of the suspect, Diaz-Torres was unable to provide a physical description at all about the assailant. As such, although the period from the time the crime occurred to the lineup may not have decreased Diaz-Torres's memory to any great extent, in this case, it does not contribute to a showing that there was an independent basis of reliability for Defendant's identification given that Diaz-Torres was never able to provide a description at all about the assailant after the carjacking occurred.

CONCLUSION

For the most part, the factors considered in the Court's reliability assessment weigh against a finding that Diaz-Torres's lineup identification could derive from a source other than the suggestive lineup. For the most part, the Government relied on the testimony of Diaz-Torres stating it was not very dark on the night the carjacking occurred, and that he was at a close proximity to the assailant when a gun was pressed to his head. (Docket No. 94 at 10) However, the record clearly shows that on the day the carjacking occurred the sun was down at 6:30 PM while the carjacking occurred at 9:45 PM. Further there was no evidence as to pole lights near the carjacking event. Additionally, the Government simply argued that Diaz-Torres was able to provide a thorough description of the assailant without considering the fact that the assailant was unable to provide a description of the assailant immediately after the carjacking occurred, and that the descriptions he provided thereafter were all different. The Court finds the Government failed to meet its burden to prove an independent basis of reliability by clear and convincing evidence. Therefore, in a lineup procedure wherein three out of five individuals in the lineup were not thin, and the remaining candidate other than the defendant was not light colored, and the identified person was the only one who matched the description provided by

the victim and with a visible “Adams apple” notwithstanding wearing a turtleneck shirt, the Court finds the Defendant’s right to due process under law was abridged by the introduction of Diaz-Torres’s identification. Consequently, the Court **GRANTS** the Defendant’s *Motion to Suppress Identification Evidence and to Preclude Tainted In-Court Identification Testimony* (Docket No. 60)

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 6th day of December, 2018.

/s/ DANIEL R. DOMINGUEZ

DANIEL R. DOMINGUEZ
U.S. District Judge